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2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4

5
6 ROBERT LAWRENCE WILLIAMS,

7 Plaintiff,

8 v.

9
10 CITY OF SAN LEANDRO, SAN
11 LEANDRO CHIEF OF POLICE,
12 OFFICER MUND, OFFICER JOHN DOE,

13 Defendants.

Case No.: C 13-2302 CW (PR)

ORDER OF SERVICE AND DISMISSING
CERTAIN CLAIMS WITH LEAVE TO
AMEND

14 On May 21, 2013, Plaintiff, in state custody at a residential
15 program in Oakland, California, filed a pro se civil rights action
16 pursuant to 42 U.S.C. § 1983 alleging that San Leandro police
17 officers violated his constitutional rights. On October 1, 2013,
18 the Court issued an order granting Plaintiff an extension of time
19 to file certificate of funds (COF) documents to complete his in
20 forma pauperis (IFP) application. See Doc. no. 5. On October 17,
21 2013, Anthony Quillin, House Manager of Plaintiff's residential
22 program, submitted a letter to the Court indicating that the
23 program does not have trust fund accounts and that it only asks
24 residents, when employed, to provide a copy of their check stubs
25 so the program has a record of their employment. See Doc. no. 6.

26 The Court finds that Plaintiff's IFP application is complete
27 and it is granted in a separate Order.
28

DISCUSSION

I. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *Id.* § 1915A(b)(1), (2). *Pro se* pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

Liability may be imposed on an individual defendant under 42 U.S.C. § 1983 if the plaintiff can show that the defendant's actions both actually and proximately caused the deprivation of a federally protected right. *Lemire v. Cal. Dept. Corrections & Rehabilitation*, 756 F.3d 1062, 1074 (9th Cir. 2013); *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988); *Harris v. City of Roseburg*, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives another of a constitutional right within the meaning of § 1983 if he does an affirmative act, participates in another's affirmative act or omits to perform an act which he is legally required to do, that causes the deprivation of which the plaintiff complains.

1 Leer, 844 F.2d at 633. Under no circumstances is there respondeat
2 superior liability under § 1983. Lemire, 756 F.3d at 1074. Or,
3 in layman's terms, under no circumstances is there liability under
4 § 1983 solely because one is responsible for the actions or
5 omissions of another. Taylor v. List, 880 F.2d 1040, 1045 (9th
6 Cir. 1989); Ybarra v. Reno Thunderbird Mobile Home Village, 723
7 F.2d 675, 680-81 (9th Cir. 1984).

8 Local governments are "persons" subject to liability under 42
9 U.S.C. § 1983 where official policy or custom causes a
10 constitutional tort, see Monell v. Dep't of Social Servs., 436
11 U.S. 658, 690 (1978); however, a city or county may not be held
12 vicariously liable for the unconstitutional acts of its employees
13 under the theory of respondeat superior, see Board of Cty.
14 Comm'rs. of Bryan Cty. v. Brown, 520 U.S. 397, 403 (1997); Monell,
15 436 U.S. at 691. To impose municipal liability under
16 § 1983 for a violation of constitutional rights, a plaintiff must
17 show: (1) that the plaintiff possessed a constitutional right of
18 which he or she was deprived; (2) that the municipality had a
19 policy; (3) that this policy amounts to deliberate indifference to
20 the plaintiff's constitutional rights; and (4) that the policy is
21 the moving force behind the constitutional violation. Plumeau v.
22 School Dist. #40 County of Yamhill, 130 F.3d 432, 438 (9th Cir.
23 1997).

24 II. Plaintiff's Allegations

25 Plaintiff alleges that in late January or early February
26 2013, he was stopped at the border of San Leandro and Oakland by
27 San Leandro Police Officer Mund and another officer, who Plaintiff
28 labels Officer John Doe. The officers told Plaintiff they stopped
him because he was "moving in his car." The officers asked

1 Plaintiff if he had any guns or drugs and he responded, "No."
2 Nevertheless, the officers took Plaintiff out of his car, searched
3 him and placed him in the patrol car. One officer started
4 searching Plaintiff's car. The officers' dispatcher informed them
5 that Plaintiff was on probation, but without a search clause.

6 The officers took Plaintiff's identification and told him to
7 meet them back at the police station. Plaintiff went to the
8 police station but never got his identification back from them.

9 III. Fourth Amendment Violation

10 The Fourth Amendment proscribes "unreasonable searches and
11 seizures." U.S. Const. amend. IV; Allen v. City of Portland, 73
12 F.3d 232, 235 (9th Cir. 1995); Franklin v. Foxworth, 31 F.3d 873,
13 875 (9th Cir. 1994). The ultimate test of reasonableness requires
14 the court to balance the government's justification and the level
15 of intrusion into the privacy of the individual. Easyriders
16 Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1496 (9th Cir.
17 1996). In order to claim the protection of the Fourth Amendment,
18 one must "demonstrate that he personally has an expectation of
19 privacy in the place searched, and that his expectation is
20 reasonable; i.e., one which has 'a source outside of the Fourth
21 Amendment, either by reference to concepts of real or personal
22 property law or to understandings that are recognized and
23 permitted by society.'" Minnesota v. Carter, 525 U.S. 83, 88
(1998) (citation omitted).

24 Construed liberally, Plaintiff's allegations state a
25 cognizable Fourth Amendment claim against Officer Mund. However,
26 because the complaint does not mention the San Leandro Chief of
27 Police and because there is no vicarious liability in
28

1 § 1983 actions, Plaintiff fails to state a claim against the Chief
2 of Police. Likewise, Plaintiff fails to state a claim against the
3 City of San Leandro because the complaint contains no allegations
4 against the City. As indicated above, to state a claim against a
5 municipality, the complaint must allege that it had a policy that
6 was a moving force behind the constitutional violation. Plaintiff
7 is granted leave to amend to remedy the deficiencies in his claims
8 against the Chief of Police and the City of San Leandro, if he
9 truthfully can do so.

10 Furthermore, Plaintiff's claim against the second San Leandro
11 police officer cannot proceed at this time because that Defendant
12 is identified only as "John Doe." Plaintiff may move to amend his
13 complaint to substitute the correct name of the officer should he
14 learn that information in the future. See Gillespie v. Civiletti,
15 629 F.2d 637, 642 (9th Cir. 1980) (the use of "John Doe" to
16 identify a defendant is not favored in the Ninth Circuit).

17 IV. Consent or Declination to Proceed Before Magistrate Judge

18 In order to encourage the just, speedy and inexpensive
19 determination of 42 U.S.C. § 1983 cases filed in this district,
20 the parties may waive their right to proceed before a district
21 judge and consent to proceed before a magistrate judge for all
22 purposes. Attached to this Order is a Notice of Option to Consent
23 to Proceed Before United States Magistrate Judge and an Order
24 requiring the parties to notify the Court whether they consent or
25 decline to so proceeding. The parties shall complete the
26 requisite consent or declination form and return it to the Court
27 as set forth in paragraph 5 of the Conclusion of this Order.

28 CONCLUSION

For the foregoing reasons, the Court orders as follows:

1 1. Plaintiff states a cognizable Fourth Amendment claim
2 against San Leandro Police Officer Mund.

3 2. Plaintiff's claims against the San Leandro Chief of
4 Police and the City of San Leandro are dismissed for failure to
5 state a cognizable claim. Within twenty-eight (28) days from the
6 date of this Order, Plaintiff may file an amended complaint to
7 cure the deficiencies noted above.

8 Plaintiff shall use the Court's civil rights complaint form,
9 a copy of which is provided herewith, and include in the caption
10 both the case number of this action, No. C 13-2302 CW (PR), and
11 the heading "AMENDED COMPLAINT."

12 If Plaintiff fails timely to file an amended complaint in
13 conformity with this Order, the claims against the San Leandro
14 Police Chief and the City of San Leandro will be dismissed without
15 prejudice and the cognizable claim against Officer Mund will
16 proceed.

17 3. The Clerk of the Court shall mail a Notice of Lawsuit and
18 Request for Waiver of Service of Summons, two copies of the Waiver
19 of Service of Summons, a copy of the complaint (docket no. 1) and
20 all attachments thereto, a copy of this Order and a copy of the
21 form "Consent or Declination to Magistrate Judge Jurisdiction" to
22 San Leandro Officer Mund. The Clerk shall also mail a copy of the
23 complaint and a copy of this Order to the San Leandro Office of
24 the City Attorney, 835 E. 14th Street, San Leandro, California,
25 94577, and a copy of this Order to Plaintiff.

26 4. Defendant is cautioned that Rule 4 of the Federal Rules
27 of Civil Procedure requires him to cooperate in saving unnecessary
28 costs of service of the summons and complaint. Pursuant to Rule
4, if Defendant, after being notified of this action and asked by

1 the Court, on behalf of Plaintiff, to waive service of the
2 summons, fails to do so, he will be required to bear the cost of
3 such service unless good cause be shown for the failure to sign
4 and return the waiver forms. If service is waived, this action
5 will proceed as if Defendant had been served on the date that the
6 waiver is filed, except that pursuant to Rule 12(a)(1)(B),
7 Defendant will not be required to serve and file an answer before
8 sixty days from the date on which the request for waiver was sent.
9 (This allows a longer time to respond than would be required if
10 formal service of summons is necessary.)

11 Defendant is advised to read the statement set forth at the
12 foot of the waiver form that more completely describes the duties
13 of the parties with regard to waiver of service of the summons.
14 If service is waived after the date provided in the Notice but
15 before Defendant has been personally served, the answer shall be
16 due sixty days from the date on which the request for waiver was
17 sent or twenty days from the date the waiver form is filed,
18 whichever is later.

19 5. Defendant shall file the Consent or Declination to
20 Magistrate Judge Jurisdiction on or before the date the answer is
21 due.

22 6. Defendant shall answer the complaint in accordance with
23 the Federal Rules of Civil Procedure. The following briefing
24 schedule shall govern dispositive motions in this action:

25 a. No later than thirty days from the date the answer
26 is due, Defendant shall file a motion for summary judgment or
27 other dispositive motion. If Defendant files a motion for summary
28 judgment, it shall be supported by adequate factual documentation
and shall conform in all respects to Federal Rule of Civil

1 Procedure 56. If Defendant is of the opinion that this case
2 cannot be resolved by summary judgment, Defendant shall so inform
3 the Court prior to the date the summary judgment motion is due.
4 All papers filed with the Court shall be promptly served on
5 Plaintiff.

6 At the time of filing the motion for summary judgment or
7 other dispositive motion, Defendant shall comply with the Ninth
8 Circuit's decisions in Woods v. Carey, 684 F.3d 934 (9th Cir.
9 2012), and Stratton v. Buck, 697 F.3d 1004 (9th Cir. 2012), and
10 provide Plaintiff with notice of what is required of him to oppose
11 a summary judgment motion or a motion to dismiss for failure to
12 exhaust administrative remedies. b.

13 Plaintiff's opposition to the motion for summary judgment or other
14 dispositive motion shall be filed with the Court and served on
15 Defendant no later than twenty-eight days after the date on which
16 Defendant's motion is filed.

17 Before filing his opposition, Plaintiff is advised to read
18 the notice that will be provided to him by Defendant when the
19 motion is filed, and Rule 56 of the Federal Rules of Civil
20 Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (party
21 opposing summary judgment must come forward with evidence showing
22 triable issues of material fact on every essential element of his
23 claim). Plaintiff is cautioned that because he bears the burden
24 of proving his allegations in this case, he must be prepared to
25 produce evidence in support of those allegations when he files his
26 opposition to Defendant's summary judgment motion. Such evidence
27 may include sworn declarations from himself and other witnesses to
28 the incident, and copies of documents authenticated by sworn

1 declaration. Plaintiff will not be able to avoid summary judgment
2 simply by repeating the allegations of his complaint.

3 c. Defendant shall file a reply brief no later than
4 fourteen days after the date Plaintiff's opposition is filed.

5 d. The motion shall be deemed submitted as of the date
6 the reply brief is due. No hearing will be held on the motion
7 unless the Court so orders at a later date.

8 7. Discovery may be taken in this action in accordance with
9 the Federal Rules of Civil Procedure.

10 8. All communications by Plaintiff with the Court must be
11 served on Defendant, or Defendant's counsel once counsel has been
12 designated, by mailing a true copy of the document to Defendant or
13 Defendant's counsel.

14 9. It is Plaintiff's responsibility to prosecute this case.
15 Plaintiff must keep the Court informed of any change of address by
16 filing a separate paper with the Clerk headed "Notice of Change of
17 Address," and must comply with the Court's orders in a timely
18 fashion. Failure to do so may result in the dismissal of this
19 action for failure to prosecute pursuant to Federal Rule of Civil
20 Procedure 41(b).

21 10. Extensions of time are not favored, though reasonable
22 extensions will be granted. Any motion for an extension of time
23 must be filed no later than fourteen days prior to the deadline
24 sought to be extended.

25 IT IS SO ORDERED.

26 Dated: 12/5/2013



27 CLAUDIA WILKEN
28 UNITED STATES DISTRICT JUDGE